No. 83-1210

IN THE

Supreme Court of the United States

October Term, 1983

JOHN PUGIOTI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Whether a writ should issue to review a state court's discretionary refusal to allow petitioner to withdraw an intelligently and voluntarily entered guilty plea?

2. Whether a writ should issue to review a state court's discretionary refusal to relieve counsel and grant a continuance to allow new counsel to be appointed where petitioner had already been granted one continuance for this purpose and his last minute request was calculated to delay the proceedings.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of New York, respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the decision of the New York Supreme Court, Appellate Division, First Department.

Statement of the Case

The Indictment

By an indictment filed on or about January 19, 1982, the Bronx County Grand Jury charged that petitioner had committed the crimes of Attempted Murder in the Second De-

gree (two counts), Criminal Use of a Firearm in the First Degree, Assault in the First Degree (four counts), Criminal Use of a Firearm in the Second Degree, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of a Weapon in the Third Degree. Indictment Number 262/82.

The Plea

On October 4, 1982, after his two victims had testified at trial, petitioner aborted the trial and pled guilty to the top two counts of the indictment as part of a negotiated plea and sentence agreement whereby all the remaining counts of the indictment were dismissed in exchange for petitioner's agreement to accept a prison sentence of not less than six years and not more than eighteen years (R. 65-67, 68, 69, 72, 96, 103, 110-111).*

Petitioner admitted that on the evening of December 2, 1981, he shot both Phillip Giambrone and Mario Bucceri R. 73-74). Petitioner was involved in an automobile collision with his two victims and after they helped petitioner to repair his car, he shot each of them once in the head (R. 95-96).

Petitioner acknowledged that he had discussed the plea with his attorney, Michael Direnzo, and with his family, and assured the court that he had not been forced to plead guilty, but did so voluntarily (R. 65-67, 68-69, 71). Petitioner understood that by pleading guilty he was waiving the right to continue his jury trial with its concomitant rights to a unanimous jury verdict, to present witnesses on his own behalf, to cross-examine the People's witnesses

* Numerals preceded by "R" refer to the pages of petitioner's Appendix below.

and, to testify on his own behalf (R. 69-71). After determining that petitioner had, in fact, committed the crime of Attempted Murder in the Second Degree, and that his plea was entered voluntarily, the court accepted it (R. 76). Appellant was paroled with the consent of the prosecutor, so that he could obtain medical treatment* prior to the execution of sentence (R. 78-82).

Petitioner's Motion to Withdraw His Guilty Plea

On October 29, 1982, the date sentence was to be imposed, petitioner, through his counsel Michael Direnzo, informed the court that he wished to withdraw his guilty plea (R. 89-90). To effectuate the plea withdrawal, petitioner had retained Phillip Carlton, a Florida attorney who apparently was not admitted to practice in New York (R. 90). The court indicated that a voluntary guilty plea had been entered and that it would not entertain an oral motion to withdraw the plea at that time, but would grant a continuance to afford Mr. Carlton the opportunity to submit a formal written plea withdrawal application (R. 101). The court then remanded petitioner (R. 103).

The Sentence

On November 5, 1982, the adjourned sentence date, Michael Direnzo appeared on behalf of petitioner because Phillip Carlton, whom petitioner sought to have substituted as his counsel, was not present (R. 106-108). In light of Mr. Carlton's absence, the court denied Mr. Direnzo's motion to be relieved as petitioner's counsel (R. 114, 116).

* Petitioner, an amputee, was to be fitted with a prosthetic device (R. 79-80).

The court stated that, in the absence of a formal application, it would refuse to entertain petitioner's application to withdraw his plea (R. 108-109). Availing himself of his right to speak prior to the imposition of sentence, petitioner told the court that he was not guilty and pled guilty only because he was told he was going to lose his trial (R. 115). After hearing from petitioner, the court imposed the negotiated sentence of not less than six nor more than eighteen years' imprisonment (R. 115-118).

The Decision of the New York Supreme Court, Appellate Division, First Department

By an order entered September 27, 1983, the New York Supreme Court, Appellate Division, First Department, unanimously affirmed, without opinion, petitioner's judgment of conviction. *People* v. *Pugioti,* 96 A.D.2d 1152 (1st Dept. 1983).

Order Denying Leave to Appeal to the New York Court of Appeals

By an order entered November 22, 1983, The Honorable Bernard S. Meyer, Associate Judge of the New York Court of Appeals, denied, without opinion, petitioner's application to appeal to that court. *People* v. *Pugioti,* —— N.Y.2d —— (1983).

ARGUMENT

POINT

A writ of certiorari should not issue to review a state trial court's discretionary refusal to allow petitioner to withdraw an intelligently and voluntarily entered guilty plea and its discretionary refusal to grant a continuance to enable new counsel to be appointed, where petitioner had already been granted one continuance for this purpose.

Petitioner contends that a writ of certiorari should be issued to review the state trial court's refusal: 1) to allow petitioner to withdraw his intelligently and voluntarily entered guilty plea, and 2) to relieve petitioner's counsel, Michael Direnzo and grant a further continuance to enable new counsel to be substituted. Since these actions were within the informed discretion of the state trial court and turn upon their own facts, affecting only the litigants, a writ should not be issued.

The decision to allow a criminal defendant to withdraw his validly entered guilty plea is committed to the sound discretion of the trial court. *See Nagelberg* v. *United States*, 377 U.S. 266 (1964); *People* v. *Tinsley*, 35 N.Y.2d 926 (1974). This Court has consistently refused to review the discretion of state trial courts. *See Avery* v. *Alabama*, 308 U.S. 444, 446 (1940). Petitioner's case does not warrant a departure from this long held principle, especially because the state appellate court correctly decided the issue. *See* Stern and Gressman, *Supreme Court Practice*, 5th ed. 1978, § 635, p. 490.

Petitioner entered a plea bargain only after his victims had testified against him at trial. This fact, coupled with a lengthy, detailed plea allocution, during which petitioner acknowledged that his guilty plea was voluntary and entered only after consultation with his attorney and family, incontrovertibly established the voluntary and intelligent nature of petitioner's plea. *See People* v. *Friedman*, 39 N.Y.2d 463, 467 (1976); *People* v. *Dixon*, 29 N.Y.2d 55 (1971). Notwithstanding petitioner's claims to the contrary, the epileptic seizure of a witness was largely irrelevant and did not force his guilty plea. In any event, petitioner's guilty plea forfeited his right to contest the court's decision not to declare a mistrial in the wake of such an incident. *See Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975); *Tollett* v. *Henderson*, 411 U.S. 258, 263 (1973); *People* v. *LaRuffa*, 34 N.Y.2d 242 (1974), *vacated on other grounds*, 419 U.S. 959 (1974). Moreover, petitioner never cited the witness' epileptic fit, nor any other reason to support his eleventh hour plea withdrawal motion. Nevertheless, the trial court was willing to entertain petitioner's motion, but only upon a formal written application, which would articulate the basis on which he sought to withdraw his plea of guilty. When petitioner failed to submit a formal application on the adjourned sentence date however, petitioner's plea withdrawal attempt was unmasked as a purely dilatory tactic. Thus, the court correctly refused to entertain petitioner's plea withdrawal motion. *See, generally, Brady* v. *United States*, 397 U.S. 742, 756-757 (1970).

Equally meritless is petitioner's contention that the trial court should have relieved petitioner's counsel, Michael Direnzo, and granted a further continuance to enable new

counsel to be substituted. As with the withdrawal of a guilty plea, "broad discretion must be granted trial courts on matters of continuances." *Morris* v. *Slappy*, —— U.S. ——, 103 S.Ct. 1610, 1616 (1983); *see Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *Lisenba* v. *California*, 314 U.S. 219, 228 (1941); *Avery* v. *Alabama, supra*. This Court should not review the state trial court's discretionary refusal to grant petitioner's last minute request for a continuance to obtain new counsel. *See Avery* v. *Alabama, supra*. Moreover, the state appellate court correctly decided this issue.

Petitioner, who had been free on bail for four weeks, waited until the last possible moment, just prior to the imposition of sentence, before he requested a new attorney. Although petitioner could offer no explanation for the delay, the trial court did not summarily deny this untimely request, but granted an initial continuance to enable new counsel to prepare a plea withdrawal motion. When new counsel failed to appear on the adjourned date however, the court refused to either relieve Michael Direnzo or grant yet another continuance to enable new counsel to be appointed. Mr. Direnzo stood by petitioner, as counsel, while the trial court proceeded with sentence. Thus, petitioner's claim that he was sentenced without counsel is not supported by the record.

Furthermore, although petitioner desired counsel other than Michael Direnzo, it is axiomatic that the right to counsel of one's choosing is not an absolute right. *United States* v. *Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979); *United States* v. *Tortora*, 464 F.2d 1202, 1210 (2d Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972); *United States ex rel. Basker-*

ville v. *Deegan*, 428 F.2d 714, 716 (2d Cir. 1970), *cert. denied*, 400 U.S. 928 (1970); *United States* v. *Burkeen*, 355 F.2d 241, 245 (6th Cir. 1966), *cert. denied*, 384 U.S. 957 (1966); *Tibbett* v. *Hand*, 294 F.2d 68, 73 (10th Cir. 1961); *see Morris* v. *Slappy*, *supra* (Sixth Amendment does not guarantee meaningful relationship between accused and his counsel). Here, petitioner's last minute request for new counsel was clearly a dilatory tactic, calculated to delay his inevitable incarceration. Under such circumstances, the trial court correctly refused to sanction such an abuse of the judicial process. *See United States* v. *Llanes*, 374 F.2d 712, 717 (2d Cir. 1967), *cert. denied*, 388 U.S. 917 (1967); *Cleveland* v. *United States*, 322 F.2d 401, 402-403 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 884 (1963); *see generally Holloway* v. *Arkansas*, 435 U.S. 475, 486-487 (1978). Therefore, the trial court acted properly in refusing to relieve Mr. Direnzo and seeing to it that he represented petitioner at sentence.

In sum, certiorari review is unwarranted in this case. The actions of the state trial court were within its discretion and turned on the peculiar facts of petitioner's case. Thus, review could affect only the litigants and no question of overriding importance has been presented to justify the issuance of a writ of certiorari.

Conclusion

The petition for a writ of certiorari should, in all respects, be denied.

Respectfully submitted,

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